

DEC 22 2017

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. NC-16-1277-BJuF
) NC-16-1299-BJuF
DAVID WILLIAM BARTENWERFER and) (Cross-Appeals)
KATE MARIE BARTENWERFER,)
) Bk. No. 13-30827
Debtors.)
) Adv. No. 13-03185
)
DAVID WILLIAM BARTENWERFER;)
KATE MARIE BARTENWERFER,)
)
Appellants/Cross-Appellees,)
)
v.) **M E M O R A N D U M**¹
)
KIERAN BUCKLEY,)
)
Appellee/Cross-Appellant.)
)

Argued and Submitted on June 22, 2017,
at San Francisco, California

Filed - December 22, 2017

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Matthew J. Olson of Macdonald Fernandez LLP argued
for appellants/cross-appellees David and Kate
Bartenwerfer; Janet Marie Brayer and Stephen Davis
Finestone argued for appellee/cross-appellant
Kieran Buckley.

Before: BRAND, JURY and FARIS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Appellants/cross-appellees David and Kate Bartenwerfer appeal
2 a judgment determining that the debt from a state court judgment
3 owed to appellee/cross-appellant Kieran Buckley was excepted from
4 the Bartenwerfers' discharge under § 523(a)(2)(A).² The
5 bankruptcy court found after a two-day trial that the
6 Bartenwerfers knowingly concealed material defects in a home they
7 sold to Buckley. Buckley cross-appeals the court's ruling that he
8 was not entitled to attorney's fees incurred for prosecuting the
9 dischargeability action against the Bartenwerfers, because he
10 failed to plead a claim for such fees as required by former
11 Rule 7008(b), in effect at the time the adversary complaint was
12 filed.

13 We AFFIRM, in part, and VACATE and REMAND, in part.

14 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

15 A. Prepetition events

16 1. Sale to Buckley

17 The Bartenwerfers purchased the property at issue in 2005
18 (the "Property") with a plan to remodel and sell it.
19 Mr. Bartenwerfer is not a licensed contractor nor does he have any
20 education or training in construction. Mrs. Bartenwerfer was a
21 licensed real estate agent when they sold the Property to Buckley.
22 After the purchase, the Bartenwerfers substantially remodeled
23 the Property, increasing its size from 2,600 square feet to 3,900
24 square feet. Various contractors and subcontractors completed
25 work on the project; Mr. Bartenwerfer's brother, Dale, who is not

26 ² Unless specified otherwise, all chapter, code and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 a licensed contractor, also did some work on it.

2 Prior to the Buckley sale, the Bartenwerfers signed
3 disclosure statements regarding the Property's condition known as
4 "Transfer Disclosure Statements" ("TDS"), which are governed by
5 Cal. Civ. Code § 1102 et seq. The Bartenwerfers made
6 representations as to their knowledge regarding any past or
7 present water leaks, the condition of the roof and windows, and
8 whether any additions or other alterations or repairs were made to
9 the Property without necessary permits or in violation of any
10 building codes. In the TDS, the Bartenwerfers certified that the
11 information therein was true and correct to the best of their
12 knowledge as of that date.

13 The Bartenwerfers sold the Property to Buckley, a general
14 contractor, in January 2008. The Bartenwerfers represented in the
15 sales contract that "Seller has no knowledge or notice that the
16 Property has any material defects other than as disclosed by the
17 Seller in the [TDS] or other writing before Acceptance or as soon
18 thereafter as practicable." The Bartenwerfers made no additional
19 written disclosures beyond what was contained in the TDS and sales
20 contract. The parties executed several addenda to the sales
21 contract, including a provision for certain repairs requested by
22 Buckley and a holdback of funds to address outstanding permit and
23 heating issues.

24 After the sale, Buckley discovered problems with the
25 Property, including water leaks, defective window conditions due
26 to improper installation, open permit issues and fire escape non-

1 compliance (the "Subject Defects").³ Unable to resolve their
2 post-sale disputes over issues plaguing the Property, Buckley sued
3 the Bartenwerfers in state court.

4 **2. Buckley's state court action**

5 Buckley's complaint against the Bartenwerfers alleged causes
6 of action for breach of contract, negligence, negligent and
7 intentional misrepresentation, and failure to disclose information
8 in the sale of real estate. Buckley alleged, in part, that the
9 Bartenwerfers had intentionally or negligently failed to disclose
10 defects related to the addition's construction and had failed to
11 obtain the necessary permits for that construction. Buckley
12 sought general and special damages, interest, punitive damages,
13 rescission of the sales contract, attorney's fees and costs.

14 After a 19-day trial, a jury entered a special verdict,
15 finding in favor of Buckley on his causes of action for breach of
16 contract, negligence and failure to disclose, and finding in favor
17 of the Bartenwerfers on the causes of action for negligent and
18 intentional misrepresentation. For Buckley's claim for
19 "nondisclosure of material facts" (as titled in the verdict), the
20 jury found: (1) the Bartenwerfers did not disclose information
21 that they "knew or reasonably should have known" about the Subject
22 Defects; (2) Buckley did not know and could not have reasonably
23 discovered this information; (3) the Bartenwerfers knew or
24 reasonably should have known that Buckley did not know and could
25 not have reasonably discovered the information; (4) this
26 information significantly affected the value or desirability of

27 ³ Other defects existed, but the Subject Defects were the
28 defects relevant to Buckley's § 523(a)(2)(A) claim.

1 the Property; (5) Buckley was harmed; and (6) the Bartenwerfers'
2 failure to disclose the information was a substantial factor in
3 causing Buckley's harm.

4 The jury awarded Buckley damages of \$444,671. The damages
5 relevant here are:

6 Nondisclosure of Subject Defects: water leaks (\$48,981);
7 window conditions (\$20,000); status of permits (\$14,888);
8 cost for installing a needed fire escape (\$5,076);

9 Price/Value Differential ("PVD"): \$300,000 (difference
10 between price Buckley paid for the Property and its fair
11 market value at time of purchase); and

12 Costs of Suit (exclusive of attorney's fees): \$40,019.89.

13 The jury awarded Buckley "\$0" for "intentional fraud" and declined
14 to award punitive damages.

15 The \$300,000 PVD award was later reduced to \$90,000, as
16 reflected in the state court's remittitur and subsequent amended
17 judgment ("State Court Judgment"). The State Court Judgment
18 provided that Buckley recover from the Bartenwerfers, jointly and
19 severally, \$234,671 plus 10% interest from October 4, 2012 until
20 paid and attorney's fees and costs pursuant to a noticed motion.

21 Buckley thereafter filed his post-trial motion for attorney's
22 fees, seeking \$378,491.72. The issue was fully briefed and a
23 hearing scheduled. The Bartenwerfers filed their bankruptcy case
24 before the state court could hear the fee matter.

25 **B. Postpetition events**

26 **1. Buckley's dischargeability complaint**

27 After the Bartenwerfers filed their chapter 7 bankruptcy
28 case, Buckley filed his dischargeability complaint, alleging that
the State Court Judgment was excepted from discharge under
§ 523(a)(2)(A). Buckley alleged that the Bartenwerfers had

1 concealed from him material information concerning the Property,
2 including that the work performed was not done in compliance with
3 building codes and was done by unlicensed contractors or the
4 Bartenwerfers themselves, and that there were multiple leaks due
5 to improperly installed windows, doors and roofing. Buckley
6 further alleged that the Bartenwerfers did not disclose that all
7 permits were still "open" and that there had been no final sign
8 off on electrical or plumbing work despite the fact that all walls
9 were closed at the time of sale.

10 Buckley alleged that the Bartenwerfers knowingly failed to
11 disclose information that they knew was material to Buckley, with
12 the intent to induce him to rely on the nondisclosures and to
13 proceed with his purchase of the Property. Buckley alleged that
14 he justifiably relied on the Bartenwerfers' nondisclosures,
15 completed his purchase of the Property and suffered damages as
16 found by the jury.

17 In his prayer for damages, Buckley requested: (1) a
18 determination that the Bartenwerfers' debt to him, including
19 interest accrued at the legal rate, was nondischargeable;
20 (2) punitive damages; and (3) costs of suit incurred in the
21 adversary proceeding. Paragraph 4 of the complaint's preamble
22 stated that, in addition to the amount of the State Court
23 Judgment, Buckley was "entitled to recovery [sic] attorneys' fees
24 totaling \$378,491." Paragraph 13 of the complaint stated: "As a
25 result of Defendant's actions, Plaintiff has suffered damages as
26 found by the jury in the pre-petition state court trial, to wit,
27 \$234,671 plus attorneys' fees and costs totaling \$378,491."

28 ////

1 **2. Pretrial motions**

2 The Bartenwerfers moved for judgment on the pleadings or,
3 alternatively, for summary judgment on Buckley's § 523(a)(2)(A)
4 claim. The Bartenwerfers maintained that they were entitled to
5 judgment on the basis of issue preclusion, because the jury
6 expressly found that they did not engage in fraud and did not
7 intentionally or negligently misrepresent any facts to Buckley;
8 the jury found only that the Bartenwerfers breached their contract
9 with Buckley, were negligent, and did not disclose facts that they
10 "knew or should have known." The jury also did not award any
11 damages for fraud and declined to award punitive damages, which
12 the Bartenwerfers argued indicated no fraud.

13 Buckley also moved for summary judgment on the basis of issue
14 preclusion. Part of the jury's damages award was the PVD award
15 under Cal. Civ. Code § 3343, which is a "fraud" damage. Buckley
16 argued that because the state court upheld the PVD award in its
17 remittitur, only reducing it, the court must have concluded that
18 the Bartenwerfers committed fraud. Thus, argued Buckley, because
19 the issue of the Bartenwerfers' fraud was actually litigated and
20 necessarily decided against them (and all of the other elements
21 for issue preclusion were met), he was entitled to summary
22 judgment on his § 523(a)(2)(A) claim. In closing, Buckley stated
23 his intention to move for attorney's fees and costs incurred in
24 the adversary proceeding by separate motion after entry of
25 judgment. He also raised this issue in his trial brief.

26 The bankruptcy court ultimately denied the parties'
27 dispositive motions.

28 ////

1 **3. Trial on Buckley's complaint**

2 The bankruptcy court held a two-day trial to determine the
3 sole issue of whether the Bartenwerfers fraudulently failed to
4 disclose the Subject Defects to Buckley.⁴ Several witnesses
5 testified, including the Bartenwerfers, Buckley, their respective
6 real estate agents, and contractors who worked on the Property.

7 Once Buckley rested his case-in-chief, the Bartenwerfers
8 moved for judgment on partial findings under Civil Rule 52(c) as
9 to Mrs. Bartenwerfer. They argued that Buckley had failed to
10 produce evidence that Mrs. Bartenwerfer knew of the Subject
11 Defects and intentionally failed to disclose them to Buckley or
12 that she knew anything she had represented in the TDS was false.
13 The Bartenwerfers argued that the jury's finding of "knew or
14 should have known" was insufficient to show actual knowledge of
15 any fraud by her. The court denied the Bartenwerfers' motion.

16 **4. Ruling on Buckley's dischargeability complaint**

17 The bankruptcy court entered a Memorandum Decision finding in
18 favor of Buckley and against the Bartenwerfers on Buckley's
19 § 523(a)(2)(A) claim. Overall, the court found Mr. Bartenwerfer
20 not credible. His testimony was inconsistent at trial and
21 inconsistent in several respects with his state court testimony.
22 The court found that the Bartenwerfers had the requisite knowledge
23 and intent to deceive Buckley by failing to disclose the Subject

24
25 ⁴ It is undisputed that the jury had determined all of the
26 other elements of Buckley's fraud claim: (1) the Bartenwerfers
27 had a duty to disclose and failed to disclose the Subject Defects
28 to Buckley; (2) the Bartenwerfers should have disclosed such items
to Buckley; (3) Buckley reasonably relied on the omission of such
disclosures in moving forward with his purchase of the Property;
and (4) Buckley suffered damages in reliance on the Bartenwerfers'
omissions and misrepresentations.

1 Defects. Accordingly, the court found that Buckley's damages with
2 respect to the Subject Defects were nondischargeable under
3 § 523(a) (2) (A) .

4 The court entered judgment in favor of Buckley and against
5 the Bartenwerfers for \$218,964.89, which consisted of \$48,981 for
6 water leaks, \$20,000 for window conditions, \$14,888 for permit
7 issues, \$5,076 for the missing fire escape, \$90,000 for the PVD
8 damages and \$40,019.89 for the state court costs of suit ("523
9 Judgment"). The court subsequently granted the Bartenwerfers'
10 motion to alter or amend the 523 Judgment, reducing the PVD
11 damages to \$65,000.

12 **5. Post-trial fee motions**

13 **a. Buckley's motion for attorney's fees**

14 Buckley filed his post-trial motion for attorney's fees and
15 interest, requesting \$502,942.00 in fees (which included his state
16 court attorney's fees of \$378,491) and \$349,715 for interest on
17 his attorney's fees and post-judgment interest ("Fee Motion").

18 The Bartenwerfers opposed the Fee Motion on the basis that
19 Buckley failed to plead a claim for attorney's fees for either the
20 state court action or the adversary proceeding as required under
21 former Rule 7008(b), in effect when he filed his dischargeability
22 complaint. In addition, the Bartenwerfers argued that Buckley's
23 state court attorney's fees were not recoverable because they were
24 "special damages" and were not pleaded with the specificity
25 required under Civil Rule 9(g). If the court was inclined to
26 award any attorney's fees, the Bartenwerfers argued that Buckley
27 was required to apportion his fees and costs incurred in
28 litigating the single claim of the five causes of action that

1 related to the adversary proceeding.

2 In the order on the Fee Motion (the "June 23 Order"), the
3 bankruptcy court applied former Rule 7008(b) and found that
4 Buckley's complaint sufficiently pled a claim for his state court
5 attorney's fees and costs. However, the court denied Buckley's
6 request for his adversary fees, because he had failed to make any
7 demand for them. Finally, the court declined to require Buckley
8 to apportion his state court attorney's fees; the fees sounded in
9 contract, not tort, and therefore they were nondischargeable along
10 with the nondischargeable portion of the State Court Judgment.

11 The bankruptcy court subsequently reopened the evidentiary
12 record to determine whether Buckley's state court attorney's fees
13 of \$378,491 were reasonable and whether the 523 Judgment should
14 have included post-judgment interest on the nondischargeable
15 portion of the State Court Judgment from October 4, 2012, and, if
16 so, what rate of interest should apply - the California rate or
17 the federal rate.

18 **b. Further proceedings on the Fee Motion**

19 In his supplemental brief, Buckley contended that his request
20 for fees of \$378,491 was reasonable given the modest hourly rates
21 charged, a 19-day jury trial and that the parties had litigated
22 the state court action for nearly five years. Buckley further
23 argued that he was entitled to post-judgment interest at the
24 California rate of 10% on the portion of the State Court Judgment
25 determined nondischargeable (now \$153,945) and on his state court
26 attorney's fees of \$378,491, assuming the bankruptcy court awarded
27 that amount, which resulted in interest of \$206,114.31.

28 The Bartenwerfers argued that Buckley was not entitled to any

1 prejudgment interest on the nondischargeable portion of the State
2 Court Judgment. However, if the court was inclined to award it,
3 they contended the interest should accrue at the federal rate in
4 effect at the time the final nondischargeability judgment is
5 entered; that rate was currently .53%. The Bartenwerfers argued
6 that Buckley was not entitled to post-judgment interest as
7 compensatory damages because he failed to allege it in the
8 complaint as required by Civil Rule 8. Furthermore, the court had
9 reopened the record only for the limited purpose of liquidating
10 the reasonable amount of the state court attorney's fees, not to
11 consider interest as compensatory damages.

12 The Bartenwerfers also contended that Buckley was not
13 entitled to interest on his state court attorney's fees because
14 the state court did not award any such interest. In addition, the
15 June 23 Order stated that the bankruptcy court would only consider
16 whether the 523 Judgment should be amended to include interest on
17 the portion of the State Court Judgment found nondischargeable,
18 not that it would add additional interest on fees, which the state
19 court never awarded.

20 Finally, the Bartenwerfers disputed the reasonableness of
21 Buckley's state court attorney's fees, contending that at least
22 531 hours (\$182,566.00) of time was excessive because that claimed
23 time arose from unrelated subcontractor litigation involving third
24 parties. They also accused Buckley's counsel of improper
25 "clumping" and including noncompensable time spent on travel and
26 clerical tasks.

27 **c. Final order on the Fee Motion**

28 The bankruptcy court entered its final order on Buckley's Fee

1 Motion, awarding him pre- and postpetition interest at the
2 California rate of 10% on the nondischargeable portion of the
3 State Court Judgment (the "Final Fee Order"). The court denied
4 interest on Buckley's state court attorney's fees, because the
5 State Court Judgment failed to provide for such interest.

6 With respect to the reasonableness of the state court
7 attorney's fees, the court found that some time entries included
8 noncompensable travel time and clerical tasks "clumped" with
9 substantive legal work. Therefore, it reduced Buckley's fees to
10 \$348,483.53. However, the court found that the Bartenwerfers
11 failed to establish that Buckley's fees should be reduced for the
12 alleged time spent on unrelated matters involving third parties;
13 the Bartenwerfers had failed to introduce the state court
14 complaint into evidence and explain why these third-party time
15 entries were unrelated to the claims he had asserted against them
16 that gave rise to the nondischargeable debt.

17 Thus, the Final Fee Order: (1) awarded Buckley \$348,483.53
18 for his state court attorney's fees; (2) awarded his costs
19 incurred both in the state court action and in the adversary
20 proceeding; (3) ordered that his nondischargeable damages of
21 \$153,945 accrue interest at 10% per annum from October 4, 2012
22 until April 8, 2013, and accrue interest at 10% per annum on and
23 after April 8, 2013; and (4) ordered that Buckley's state court
24 attorney's fees not bear any interest.

25 **d. Buckley's motion to reconsider the Final Fee Order**
26 **and ruling**

27 Just before the bankruptcy court entered its amended 523
28 Judgment to reflect the Final Fee Order, Buckley timely filed a

1 motion to alter or amend the Final Fee Order. Buckley contended
2 that the court erred by not awarding interest on his state court
3 attorney's fees, even without an express provision in the State
4 Court Judgment awarding it, because California law provides that,
5 once the "attorney fee award is determined by the trial court, it
6 is added to the judgment, and the total judgment bears statutory
7 interest until paid," citing Lucky United Properties Investments,
8 Inc. v. Lee, 185 Cal. App. 4th 125, 137-38 (2010) ("Lucky").

9 Therefore, Buckley contended he was entitled to interest on the
10 attorney's fee amount of \$348,483.79 and the costs of \$30,007.47,
11 accruing from October 4, 2012, at the rate of 10% per annum. The
12 Bartenwerfers opposed Buckley's motion.

13 Ultimately, the bankruptcy court decided to reverse itself
14 and grant the reconsideration motion in its entirety, thereby
15 amending the Final Fee Order and the amended 523 Judgment.

16 **6. The Second Amended 523 Judgment**

17 The bankruptcy court entered a Second Amended 523 Judgment,
18 awarding Buckley a nondischargeable judgment of \$153,945.00, plus
19 10% interest accruing on the nondischargeable portion of the
20 judgment as of October 4, 2012, and his state court attorney's
21 fees of \$348,483.53 and costs of \$30,007.47, plus 10% interest
22 accruing on the fees and costs from October 4, 2012.

23 These timely cross-appeals followed.

24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
26 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

27 **III. ISSUES**

28 1. Did the bankruptcy court err by declining to apply issue

1 preclusion to the jury's findings of fact?

2 2. Did the bankruptcy court err by not granting
3 Mrs. Bartenwerfer's motion for judgment on partial findings?

4 3. Was there sufficient evidence of Mr. Bartenwerfer's knowledge
5 and intent to find him liable under § 523(a)(2)(A)?

6 4. Did the bankruptcy court err by applying former Rule 7008(b)
7 to deny Buckley attorney's fees for the adversary proceeding?

8 5. Did the bankruptcy court abuse its discretion in awarding
9 Buckley his state court attorney's fees and, if so, did it err by
10 awarding the amount that it did?

11 6. Did the bankruptcy court abuse its discretion by awarding
12 Buckley interest on the nondischargeable portion of the State
13 Court Judgment and on his state court attorney's fees, and did it
14 further err by awarding interest at the California judgment rate
15 of 10%?

16 IV. STANDARDS OF REVIEW

17 We review the bankruptcy court's findings of fact for clear
18 error and its conclusions of law de novo. Carrillo v. Su
19 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). A finding of
20 fact is clearly erroneous if it is illogical, implausible or
21 without support in the record. Retz v. Samson (In re Retz),
22 606 F.3d 1189, 1196 (9th Cir. 2010). "Where there are two
23 permissible views of the evidence, the factfinder's choice between
24 them cannot be clearly erroneous." Anderson v. City of Bessemer
25 City, 470 U.S. 564, 574 (1985). When factual findings are based
26 on credibility determinations, we must give even greater deference
27 to the bankruptcy court's findings. Id. at 575.

28 We review de novo the bankruptcy court's determination that

1 issue preclusion was available. Plyam v. Precision Dev., LLC
2 (In re Plyam), 530 B.R. 456, 461 (9th Cir. BAP 2015). If issue
3 preclusion was available, we review the bankruptcy court's
4 application of issue preclusion for an abuse of discretion. Id.

5 The bankruptcy court's factual findings under Civil
6 Rule 52(c) are reviewed for clear error, while its conclusions of
7 law are reviewed de novo. Kuan v. Lund (In re Lund), 202 B.R.
8 127, 129 (9th Cir. BAP 1996).

9 We will not disturb a bankruptcy court's award of attorney's
10 fees on appeal "absent an abuse of discretion or an erroneous
11 application of the law." In re Nucorp Energy, Inc., 764 F.2d 655,
12 657 (9th Cir. 1985). We review the bankruptcy court's prejudgment
13 interest award for abuse of discretion. Simeonoff v. Hiner,
14 249 F.3d 883, 894 (9th Cir. 2001).

15 A bankruptcy court abuses its discretion if it applied the
16 wrong legal standard or its factual findings were clearly
17 erroneous. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
18 832 (9th Cir. 2011).

19 V. DISCUSSION

20 A. The bankruptcy court did not err by declining to apply issue 21 preclusion to the jury's findings of fact.

22 The Bartenwerfers contend the bankruptcy court erred by not
23 giving preclusive effect to the jury's findings that they did not
24 engage in fraudulent conduct by failing to disclose the Subject
25 Defects to Buckley, as the issue of their actual fraud was
26 actually litigated and necessarily decided by the jury in their
27 favor.

28 The doctrine of issue preclusion applies to dischargeability

1 actions under § 523(a). Grogan v. Garner, 498 U.S. 279, 284 n.11
2 (1991). Issue preclusion bars relitigation of factual issues that
3 have been adjudicated in a prior action. Under the principles of
4 "full faith and credit," 28 U.S.C. § 1738, federal courts give
5 prior state-court judgments the same preclusive effect as the
6 courts of the state from which the judgment derived, Cal-Micro,
7 Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir.
8 2003). Hence, we apply California's doctrine of issue preclusion.

9 Under California law, the party asserting issue preclusion
10 bears the burden of establishing five threshold requirements:
11 (1) the issue to be precluded from relitigation must be identical
12 to that decided in a former proceeding; (2) the issue must have
13 been actually litigated in the former proceeding; (3) it must have
14 been necessarily decided in the former proceeding; (4) the
15 decision in the former proceeding must be final and on the merits;
16 and (5) the party against whom preclusion is sought must be the
17 same as the party to the former proceeding. Harmon v. Kobrin
18 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Lucido v.
19 Super. Ct., 51 Cal. 3d 335, 341 (1990). Additionally, imposition
20 of issue preclusion must be fair and consistent with sound public
21 policy. Lucido, 51 Cal. 3d at 343.

22 The party seeking to apply issue preclusion has the burden of
23 proving that each element is satisfied. To sustain this burden, a
24 party must introduce a record sufficient to reveal the controlling
25 facts and the exact issues litigated in the prior action. Tomkow
26 v. Barton (In re Tomkow), 563 B.R. 716, 722 (9th Cir. BAP 2017)
27 (citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir.
28 BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996)). However, the

1 entire record of the underlying proceedings need not be produced
2 if the issues can be ascertained from the documents presented.
3 See In re Plyam, 530 B.R. at 470 (to the extent jury findings are
4 clearly and solely based on the relevant elements, they may be
5 sufficient for application of issue preclusion); Johnson v.
6 GlaxoSmithKline, Inc., 166 Cal. App. 4th 1497, 1513 n.9 (2008) (a
7 court **may** refer to the entire record to determine issues decided
8 in earlier case). Any reasonable doubt as to what was decided in
9 the prior action will weigh against applying issue preclusion.
10 In re Tomkow, 563 B.R. at 722 (citing In re Kelly, 182 B.R. at
11 258).

12 Neither party disputes that the State Court Judgment was
13 final and on the merits and that the parties in the prior action
14 were the same. Thus, elements (4) and (5) of issue preclusion
15 were met. We now review the remaining three.

16 **1. The exact issues sought to be precluded were identical**
17 **to those in the former proceeding.**

18 To establish a claim under § 523(a)(2)(A), a creditor must
19 show: (1) misrepresentation, fraudulent omission or deceptive
20 conduct by the debtor; (2) knowledge of the falsity or
21 deceptiveness of the debtor's statement or conduct; (3) an intent
22 to deceive; (4) justifiable reliance by the creditor on the
23 debtor's statement or conduct; and (5) damage to the creditor
24 proximately caused by its reliance on the debtor's statement or
25 conduct. Turtle Rock Meadows Homeowners Ass'n v. Slyman
26 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). Concealment
27 of a material fact that a party has a duty to disclose can support
28 nondischargeability of a debt on the grounds of actual fraud.

1 Apte v. Japra, M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d 1319,
2 1323-24 (9th Cir. 1996).

3 Similarly, under California law, to prevail on a claim for
4 intentional misrepresentation, the plaintiff must prove: (1) a
5 misrepresentation; (2) knowledge of the falsity; (3) intent to
6 induce reliance; (4) actual and justifiable reliance; and
7 (5) resulting damage. Lazar v. Super. Ct., 12 Cal. 4th 631, 638
8 (1996). The elements of a claim for negligent misrepresentation
9 are the same except that negligent misrepresentation does not
10 require knowledge of the falsity but instead requires a
11 misrepresentation of fact by a person who has no reasonable
12 grounds for believing it to be true. Cal. Civ. Code § 1710,
13 subd. 2; West v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780,
14 792 (2013).

15 The elements of Buckley's § 523(a)(2)(A) claim and his state-
16 court claims for intentional and negligent misrepresentation were
17 identical. Even though we lack a copy of the state court
18 complaint, it seems clear based on the jury verdict that the issue
19 of the Bartenwerfers' fraudulent intent with respect to their
20 affirmative misrepresentations to Buckley was squarely at issue in
21 the state court action, as it was in the adversary proceeding.

22 **2. The issue of the Bartenwerfers' fraudulent intent**
23 **regarding the Subject Defects was actually litigated in**
24 **the former proceeding.**

25 An issue is "actually litigated" when both parties presented
26 evidence and witnesses in support of their positions and had the
27 opportunity to present full cases. Lucido, 51 Cal. 3d at 341.
28 Even without copies of the state court complaint and jury
instructions, the issue of the Bartenwerfers' fraudulent intent

1 with respect to their misrepresentations or failure to disclose
2 the Subject Defects to Buckley was actually litigated in the state
3 court action, considering that the jury made express findings on
4 that issue.

5 **3. It is not clear whether the issue of the Bartenwerfers'**
6 **fraudulent intent regarding the Subject Defects was**
7 **necessarily decided.**

8 To conclude that the issue was "necessarily decided," the
9 issue must not have been "entirely unnecessary" to the judgment in
10 the prior proceeding. Id. at 342. As sellers of real estate in
11 California, the Bartenwerfers had a duty to disclose any known
12 facts materially affecting the value or desirability of the
13 Property, when such facts were not known to, nor readily
14 discoverable by, Buckley. Cal. Civ. Code § 1102 et seq.; Calemine
15 v. Samuelson, 171 Cal. App. 4th 153, 161 (2009) ("A real estate
16 seller has both a common law and statutory duty of disclosure.").
17 Nondisclosure is tantamount to a misrepresentation. See Calemine,
18 171 Cal. App. 4th at 161.

19 Although the jury found no fraudulent intent by the
20 Bartenwerfers in connection with Buckley's claims for intentional
21 and negligent misrepresentations, it is not clear what level of
22 scienter the jury decided respecting his claim for their failure
23 to disclose information in the sale of the Property. The jury
24 found that the Bartenwerfers "knew or reasonably should have
25 known" of the Subject Defects and "knew or reasonably should have
26 known" that Buckley did not know about them and could not
27 reasonably have discovered them prior to the sale.

28 For this type of claim, if the Bartenwerfers "knew" of the
Subject Defects and failed to disclose them, then failing to

1 fulfill their duty of disclosure constitutes actual fraud.
2 Snelson v. Ondulando Highlands Corp., 5 Cal. App. 3d 243, 251
3 (1970); Lingsch v. Savage, 213 Cal. App. 2d 729, 735-36 (1963).
4 However, the standard of "reasonably should have known" suggests
5 something less than actual fraud; rather, it sounds in negligence.
6 To confuse matters more, the jury awarded Buckley PVD damages of
7 \$300,000 under Cal. Civ. Code § 3343,⁵ which is a "fraud" damage.
8 On the other hand, of the \$400,000 in damages Buckley was
9 initially awarded, the jury awarded him \$0 for "intentional
10 fraud." Thus, it is difficult to determine on this record whether
11 a finding of actual fraud was necessary to the judgment. As a
12 result, we are unable to determine conclusively whether the jury
13 found the Bartenwerfers liable on Buckley's failure to disclose
14 claim on the basis of actual fraud or something requiring a lower
15 scienter standard.

16 As the party seeking to apply issue preclusion to the jury's
17 findings of fact with respect to the Bartenwerfers' fraudulent
18 intent, it was the Bartenwerfers' burden of proving that each
19 element was satisfied. They have not done so. Any reasonable
20 doubt as to what was decided in the prior action weighs against
21 applying issue preclusion. Accordingly, the bankruptcy court did
22 not err by refusing to give preclusive effect to the jury's
23 findings of intent.

24
25 ⁵ Cal. Civ. Code § 3343 provides, in relevant part:

26 (a) One defrauded in the purchase, sale or exchange of
27 property is entitled to recover the difference between the
28 actual value of that with which the defrauded person
parted and the actual value of that which he received,
together with any additional damage arising from the
particular transaction[.]

1 **B. The bankruptcy court erred by not making a finding as to**
2 **Mrs. Bartenwerfer's intent in denying her motion for judgment**
3 **on partial findings.**

4 The Bartenwerfers contend the bankruptcy court erred in
5 denying Mrs. Bartenwerfer's motion for judgment on partial
6 findings, because there was no evidence in the record that she
7 "knew or should have known" of Mr. Bartenwerfer's alleged fraud.
8 While there may or may not have been sufficient evidence in the
9 record of Mrs. Bartenwerfer's actual knowledge, we agree that the
10 court needed to make a finding on her intent when ruling on the
11 Civil Rule 52(c) motion.

12 When deciding a motion under Civil Rule 52(c),⁶ made
13 applicable here by Rule 7052, the bankruptcy court is "not
14 required to draw any inferences in favor of the non-moving party;
15 rather, the [bankruptcy] court may make findings in accordance
16 with its own view of the evidence." Ritchie v. United States,
17 451 F.3d 1019, 1023 (9th Cir. 2006).

18 Recognizing that a marital relationship by itself is
19 insufficient to impute the fraud of one spouse to the other, the
20 bankruptcy court determined that a business or agency relationship
21 existed between the Bartenwerfers; thus, Mr. Bartenwerfer's fraud
22 could be imputed to Mrs. Bartenwerfer.

23 A California partnership is "an association of two or more

24 ⁶ Civil Rule 52(c), applicable here by Rule 7052, provides
25 in relevant part:

26 Judgment on Partial Findings. If a party has been fully
27 heard on an issue during a nonjury trial and the court
28 finds against the party on that issue, the court may enter
judgment against the party on a claim or defense that,
under the controlling law, can be maintained or defeated
only with a favorable finding on that issue.

1 persons to carry on as coowners a business for profit"
2 Cal. Corp. Code § 16101(9) (2013). Whether or not parties have
3 entered into a partnership/agency relationship rather than some
4 other form of relationship is a question of fact and depends on
5 whether they intended to share in the profits, losses and the
6 management and control of the enterprise. Tsurukawa v. Nikon
7 Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 521 (9th Cir. BAP
8 2002).

9 We agree with the bankruptcy court's agency finding.
10 Mrs. Bartenwerfer's partnership/agency relationship with
11 Mr. Bartenwerfer was established by not only her co-ownership of
12 the Property, which is a factor tending to establish partnership,
13 id., but also because she signed the TDS and sales contract and
14 she stood to benefit from the successful completion of the project
15 and sale of the Property. That she participated little in the
16 project and delegated authority to Mr. Bartenwerfer to manage it
17 does not defeat the forming of a partnership. A partnership can
18 exist as long as the parties have the right to manage the
19 business, even though in practice one partner relinquishes the
20 day-to-day management to the other partner. Id.

21 However, the court erred by imputing Mr. Bartenwerfer's
22 fraudulent intent to Mrs. Bartenwerfer on the basis of agency
23 alone. To deny Mrs. Bartenwerfer's Civil Rule 52(c) motion, the
24 court had to also find that she "knew or had reason to know" of
25 Mr. Bartenwerfer's fraudulent omissions. Sachan v. Huh
26 (In re Huh), 506 B.R. 257, 271-72 (9th Cir. BAP 2014) (en banc).
27 The court made no such finding. Accordingly, we REMAND this issue
28 for further findings as to Mrs. Bartenwerfer's actual knowledge.

1 In addition, because the bankruptcy court appears to have
2 imposed judgment against Mrs. Bartenwerfer solely on the basis of
3 her agency relationship with Mr. Bartenwerfer, we VACATE the
4 portion of the Second Amended 523 Judgment determining that
5 Buckley's debt was nondischargeable under § 523(a)(2)(A) as to
6 Mrs. Bartenwerfer.

7 **C. Sufficient evidence existed for the bankruptcy court to find**
8 **that Mr. Bartenwerfer knowingly and intentionally concealed**
9 **the Subject Defects from Buckley.**

10 The only issue for the bankruptcy court trial was whether the
11 Bartenwerfers acted with the requisite knowledge and intent to
12 support a finding of fraud by concealment for purposes of
13 § 523(a)(2)(A). The Bartenwerfers argue that the court's findings
14 of their intent to conceal the Subject Defects are erroneous and
15 not supported by the record.

16 Although we concluded above that the findings as to
17 Mrs. Bartenwerfer's intent are inadequate, we believe ample
18 evidence existed in the record for the court to find that
19 Mr. Bartenwerfer knowingly and intentionally concealed the Subject
20 Defects from Buckley for purposes of § 523(a)(2)(A).

21 **1. Water leaks**

22 The bankruptcy court found that Mr. Bartenwerfer
23 intentionally concealed the Property's water leaks of which he had
24 actual knowledge. The TDS specifically asked if there were "any
25 past or present water leaks or water intrusions," to which the
26 Bartenwerfers answered "No." At trial, Mr. Bartenwerfer admitted
27 that he paid a roofing service to repair leaks, specifically a
28 leak above the master bedroom closet near the deck. The roofing
repair service's bid to perform the repairs was dated just one

1 month before the Bartenwerfers completed and signed the TDS
2 representing that there were no past or present leaks. Shortly
3 after the sale, Buckley discovered a leak in the master bedroom
4 ceiling below the deck and other leaks.

5 Mr. Bartenwerfer testified that he did not think he had to
6 disclose the leaks to Buckley or his own real estate agent because
7 the issue had been corrected before construction was complete and
8 it "didn't feel like a big deal." The bankruptcy court did not
9 find credible Mr. Bartenwerfer's testimony that he had "made a
10 simple mistake" by not disclosing the known leaks, especially when
11 the master bedroom leak was repaired so close in time to the TDS
12 and at the very end of construction.

13 The Bartenwerfers argue that the evidence did not support a
14 finding that Mr. Bartenwerfer intentionally failed to disclose
15 water leaks. The bankruptcy court did not find credible
16 Mr. Bartenwerfer's testimony that he did not intend to deceive
17 Buckley by failing to disclose the water leaks. Because the
18 court's finding regarding Mr. Bartenwerfer's intent about the
19 water leaks is based on a credibility determination, we must give
20 that finding greater deference. In re Retz, 606 F.3d at 1196.
21 More importantly, the court did not make this finding in a vacuum.
22 It found that, based on this and other nondisclosures,
23 Mr. Bartenwerfer had the requisite knowledge and intent to deceive
24 Buckley with respect to the nondisclosure of the leaks. We
25 perceive no clear error in that finding.

26 **2. Status of permits**

27 In the TDS, the Bartenwerfers disclosed an open building
28 permit related to the kitchen, but did not disclose numerous other

1 open permits (ten to be exact), subsequent permit violations and
2 inspection failures. Mr. Bartenwerfer admitted that, at the time
3 he signed the TDS in November 2007, he was aware that electrical
4 and plumbing work had not been approved by an inspector, that the
5 permits had not received final sign off, and that a lack of a sign
6 off is something a buyer would want to know. He further admitted
7 that he did not disclose to Buckley or his real estate agent the
8 Notice of Violation, dated January 31, 2008, after the parties
9 entered into the sales contract, which stated that all permits had
10 expired and no special inspection reports had been submitted. The
11 Bartenwerfers' agent testified that the Notice of Violation would
12 have required the TDS to be amended.

13 Mr. Bartenwerfer also did not disclose to Buckley or to their
14 own agent that on February 19, 2008, the Property had "failed yet
15 another electrical inspection." Other evidence showed that
16 Mr. Bartenwerfer knew that the electrical permit was still not
17 closed out by March 13, 2008 – the day before the sale closed.
18 The Bartenwerfers also did not provide all permits to Buckley
19 until after the sale had closed.

20 The bankruptcy court found Mr. Bartenwerfer's testimony
21 regarding the status of permits not credible and ultimately found
22 that he omitted information about the status of the permits, the
23 Notice of Violation and failed inspections up through the time of
24 the closing, with the intent to deceive Buckley. The TDS would
25 have led a reasonable person to believe that the only outstanding
26 permit issues related to the kitchen, when in fact there were ten
27 outstanding permits that had continuing issues up to the time of
28 the closing in March 2008 and beyond, including their expiration

1 in January 2008. Accordingly, the court found that
2 Mr. Bartenwerfer had the requisite intent to deceive Buckley with
3 respect to nondisclosure of the status of permits.

4 The Bartenwerfers contend the bankruptcy court erred in
5 finding that Mr. Bartenwerfer knowingly and fraudulently failed to
6 disclose the status of the permits, given Addendum 4 to the sales
7 contract, wherein the parties acknowledged Mr. Bartenwerfer's need
8 to obtain sign off on all outstanding permits for the Property.
9 In other words, the Bartenwerfers argue that something that was
10 disclosed cannot have been omitted with fraudulent intent.

11 Although the parties acknowledged that a final sign off on
12 any permits was necessary, the evidence showed that Buckley was
13 not aware of the extent of the open permit issues at the time he
14 entered into the sales contract or by the time of the closing. He
15 testified that he was told only a "few minor items" were needed to
16 finalize any permits, which included some electric work and a
17 handrail installation. Given the court's credibility finding and
18 the evidence in the record, we cannot say that the bankruptcy
19 court made an erroneous finding as to Mr. Bartenwerfer's intent to
20 deceive Buckley by concealing the status of the permits.

21 The Bartenwerfers argue that Buckley failed to establish they
22 had a duty to provide him with specific updates of inspections or
23 with the permit cards prior to closing, but the jury necessarily
24 found that they had a duty to disclose issues involving the
25 permits, when the jury awarded Buckley damages associated with the
26 Bartenwerfers' failure to disclose them.

27 **3. Windows**

28 In the TDS, the Bartenwerfers answered "No" to whether they

1 were aware of "any significant defects/malfunctions" in the
2 windows. They also did not disclose any window problems in a
3 supplemental disclosure.

4 The primary evidence with respect to the window defects was
5 the testimony of Mr. Barbic, a Pella Windows technician, who
6 testified at the state court trial. In February 2008, Mr. Barbic
7 made a site visit to the Property and noted that several windows
8 had been installed "out of square" and therefore did not function
9 properly. Mr. Barbic testified that he had advised either
10 Mr. Bartenwerfer or his brother Dale of the problem and that it
11 was an installation error.

12 Mr. Bartenwerfer denied having any conversations with
13 Mr. Barbic, or anyone at Pella Windows, about the windows being
14 "out of square" and needing to be reinstalled. He did recall
15 being told that a door was out of square and that his brother
16 Dale, who is not a contractor and has no education, training or
17 expertise in California building codes, told him that the windows
18 were working properly.

19 The bankruptcy court did not find credible Mr. Bartenwerfer's
20 testimony that he was unaware that the windows had been installed
21 "out of square" because: (a) he had a conversation with Dale
22 about whether the windows were working properly; (b) he testified
23 that he believed the window problem was a manufacturing defect;
24 and (c) Mr. Barbic's testimony as to what he told Mr. Bartenwerfer
25 or Dale about the windows being out of square was so detailed and
26 specific and therefore, reliable and credible.

27 The Bartenwerfers argue that the bankruptcy court's reliance
28 on Mr. Barbic's testimony was misplaced, because it is unclear if

1 he spoke to Mr. Bartenwerfer or his brother, Dale. Mr. Barbic
2 admitted he was unsure as to which man he told the windows were
3 out of square. However, the bankruptcy court inferred that, even
4 if he spoke to Dale about this issue, then Mr. Bartenwerfer likely
5 was aware of it too based on his admitted conversations with Dale
6 about the functionality of the windows. This was not an illogical
7 or implausible inference. In any event, the bankruptcy court
8 found that, even if Mr. Bartenwerfer believed the window and door
9 problems to be manufacturing defects rather than installation
10 problems, he should have disclosed these defects to Buckley.
11 Pella Windows had been out to the Property as early as January 2,
12 2008, long before Buckley delivered his list of repairs to be
13 made, which strongly suggested Mr. Bartenwerfer was aware of the
14 door and window problems before Buckley discovered them.

15 Accordingly, we find no clear error in the bankruptcy court's
16 finding that Mr. Bartenwerfer had the requisite knowledge and
17 intent to deceive Buckley with respect to nondisclosure of the
18 window defects.

19 **4. Fire escape**

20 The Bartenwerfers also did not disclose in the TDS or
21 otherwise any information about a fire escape. Apparently, many
22 versions of design plans were done for the Property, but the final
23 version did not include a fire escape. In October 2008,
24 Mr. Bartenwerfer received an email from a contractor assisting the
25 Bartenwerfers with their permit issues, advising Mr. Bartenwerfer
26 not to give Buckley all versions of the plans because Buckley
27 might notice the missing fire escape, which could prevent a final
28 sign off on the Certificate of Final Completion. Mr. Bartenwerfer

1 testified that a fire escape was not required.

2 The bankruptcy court found that, contrary to
3 Mr. Bartenwerfer's testimony suggesting he had no duty to disclose
4 the missing fire escape because it was not included in the final
5 plans, the jury had found the omission of the lack of a fire
6 escape material and that it caused harm to Buckley. Therefore,
7 based on the email exchange between Mr. Bartenwerfer and his
8 contractor, the Bartenwerfers' apparent duty to disclose, and that
9 Mr. Bartenwerfer did not initially provide Buckley with a complete
10 set of drawings and permits, the bankruptcy court found that
11 Mr. Bartenwerfer had the requisite knowledge and intent to deceive
12 Buckley with respect to nondisclosure of the missing fire escape.

13 The Bartenwerfers dispute the bankruptcy court's finding that
14 they had a duty to disclose the requirement that a fire escape be
15 installed, when there was no evidence that any such requirement
16 existed. As with the permit issues, because the jury awarded
17 Buckley damages for the missing fire escape, it was reasonable for
18 the bankruptcy court to conclude that a fire escape was required
19 and that this fact should have been disclosed. In addition, it is
20 clear that Mr. Bartenwerfer had an ulterior motive to withhold
21 plans containing a fire escape, because he was afraid that Buckley
22 would scrutinize the plans and thus jeopardize the \$25,000
23 holdback the Bartenwerfers were set to receive if the Property
24 obtained a Certificate of Final Completion. Accordingly, we find
25 no clear error here.

26 **D. The bankruptcy court did not err by applying former**
27 **Rule 7008(b) to deny Buckley his adversary attorney's fees.**

28 Buckley cross-appeals the bankruptcy court's ruling that he

1 was not entitled to attorney's fees incurred for prosecuting the
2 dischargeability action against the Bartenwerfers because he
3 failed to plead a claim for such fees as required by the former
4 Rule 7008(b). He argues that the bankruptcy court erred by not
5 applying Amended Rule 7008(b), in effect at the time of trial,
6 which no longer requires a plaintiff to plead separately adversary
7 attorney's fees.

8 There is no general right to recover attorney's fees under
9 the Code. Renfrow v. Draper, 232 F.3d 688, 693 (9th Cir. 2000).
10 Buckley's dischargeability complaint averred a claim for relief
11 under § 523(a)(2)(A), which does not provide for an award of
12 attorney's fees. Former Rule 7008(b), which applied when Buckley
13 filed his dischargeability complaint, stated: "A request for an
14 award of attorney's fees shall be pleaded as a claim in a
15 complaint, cross-claim, third-party complaint, answer, or reply as
16 may be appropriate." A claim for adversary attorney's fees is now
17 made by post-trial motion. Rule 7054(b)(2).

18 We conclude that the bankruptcy court did not err by applying
19 former Rule 7008(b) to Buckley's adversary fees, the rule in
20 effect at the time he filed his dischargeability complaint, and
21 Buckley has not persuaded us that a different rule should have
22 been applied.

23 **E. The bankruptcy court abused its discretion by not determining**
24 **what portion of Buckley's state court attorney's fees were**
attributable to Mr. Bartenwerfer's fraud.

25 The Bartenwerfers raise a variety of arguments respecting the
26 bankruptcy court's decision to award Buckley his state court
27 attorney's fees. We address each in turn.

28 They first argue that Buckley's allegation for his state

1 court attorney's fees in the dischargeability complaint failed to
2 meet the heightened pleading standard required by Civil Rule 9(g),
3 applicable to adversary proceedings by Rule 7009. The
4 Bartenwerfers contend that Buckley's damages for his state court
5 attorney's fees were an item of "special damages," and failure to
6 plead them with specificity bars them. The Bartenwerfers
7 acknowledge that the Ninth Circuit has not yet ruled on whether
8 attorney's fees are special damages that must be pleaded with the
9 specificity required by Civil Rule 9(g), but they cite several
10 cases, including other circuit cases, which have held that they
11 are. The Bartenwerfers rely particularly on Garcia v. Odom
12 (In re Odom), 113 B.R. 623 (Bankr. C.D. Cal. 1990).

13 Even if Civil Rule 9(g) applied to Buckley's state court
14 attorney's fees, which we are not deciding, we conclude that
15 Buckley pleaded the amount he was seeking with sufficient
16 specificity to satisfy Civil Rule 9(g); he specifically requested
17 \$378,491. See Charlie Y., Inc. v. Carey (In re Carey), 446 B.R.
18 384, 394 (9th Cir. BAP 2011) (noting that what Odom and similar
19 authorities say about claims for attorney's fees as special
20 damages is that the claimant can receive no more than it pleads
21 for specifically).

22 We also reject the Bartenwerfers' argument that Buckley's
23 claim for state court attorney's fees failed to meet the ordinary
24 pleading standard of Civil Rule 8, applicable here by
25 Rule 7008(b). Buckley pleaded his claim for state court
26 attorney's fees in Paragraphs 4 and 13 of the complaint. He also
27 realleged the first 4 paragraphs of the complaint in Paragraph 5.
28 This demand was specific enough to satisfy Rule 7008(b). Id. at

1 392, 394 (claim for attorney's fees adequately pleaded for
2 purposes of Rule 7008(b), because it was stated in the body of the
3 complaint, not merely in the prayer, and included supporting
4 factual allegations for basis for the claim). Accordingly, the
5 bankruptcy court did not err in determining that Buckley's claim
6 for his state court attorney's fees complied with Rule 7008(b).

7 The Bartenwerfers next argue that the bankruptcy court erred
8 by not requiring Buckley to apportion his state court attorney's
9 fees between the single state-court cause of action ruled
10 nondischargeable – the failure to disclose information in the sale
11 of real estate – and the four additional causes of action (two of
12 which the Bartenwerfers prevailed upon) that were not the subject
13 of litigation before the bankruptcy court. It is undisputed that
14 attorney's fees for either tort or contract actions were available
15 to the prevailing party under the sales contract. For the reasons
16 stated below, we VACATE the June 23 Order, the Final Fee Order and
17 the Second Amended 523 Judgment to the extent they determined that
18 Buckley's state court attorney's fees were nondischargeable and
19 REMAND this issue for further determination by the bankruptcy
20 court.

21 In the June 23 Order, the bankruptcy court ruled that Buckley
22 was not required to apportion his fees because they were provided
23 for in the parties' agreement, which Buckley entered into as a
24 result of the Bartenwerfers' fraudulent conduct. Thus, because
25 the nondischargeable claim for fraud in this case arose entirely
26 out of the contract without distinction, the court determined that
27 Buckley's state court attorney's fees did not have to be
28 apportioned and were nondischargeable as well. That might be true

1 had the state court liquidated the amount of the fees and
2 specifically awarded them as part of any damages for fraud. See
3 Younie v. Gonya (In re Younie), 211 B.R. 367, 377 (9th Cir. BAP
4 1997). But that is not what happened here.

5 Because of the Bartenwerfers' bankruptcy filing, the state
6 court never liquidated the amount of Buckley's attorney's fees or
7 determined their reasonableness. Thus, it was up to the
8 bankruptcy court to liquidate them and to determine what portion,
9 if any, flowed from Mr. Bartenwerfer's fraudulent conduct.⁷ If the
10 jury had rendered a fraud judgment, then Buckley's state court
11 attorney's fees would also be nondischargeable. Cohen v. de la
12 Cruz, 523 U.S. 213, 218-19 (1998). However, as we noted above, we
13 are unable to determine if the State Court Judgment was based on
14 fraud, breach of contract, negligence or some combination thereof.
15 Without a copy of the state court complaint and jury instructions,
16 the bankruptcy court was also unable to make this determination.

17 Just because the bankruptcy court found fraud by
18 Mr. Bartenwerfer does not necessarily mean that the entire amount
19 of Buckley's state court attorney's fees was nondischargeable;
20 only those fees attributable to the fraud are nondischargeable
21 under § 523(a)(2)(A). Id. at 223 (compensation for fraud losses
22 include "attorney's fees and costs of suit associated with
23

24 ⁷ Ninth Circuit authority has held that the bankruptcy court
25 has the power to award state court attorney's fees when a fee
26 application there was interrupted by the bankruptcy stay.
27 Renfrow, 232 F.3d at 694-95, citing with favor, Florida v. Ticor
28 Title Ins. Co. of Cal. (In re Florida), 164 B.R. 636, 640 (9th
Cir. BAP 1994) ("[A] bankruptcy court has jurisdiction to
liquidate a claim for attorney's fees [in a state court action]
intercepted by [an] automatic stay and can determine the debt
nondischargeable on a motion for summary judgment.").

1 **establishing fraud")** (emphasis added). See also Hensley v.
2 Eckerhart, 461 U.S. 424, 440 (1983) (the extent of a plaintiff's
3 success is a crucial factor in determining the proper amount of an
4 award of attorney's fees, and where the plaintiff has failed to
5 prevail on a claim that is distinct in all respects from his
6 successful claims, the hours spent on the unsuccessful claim
7 should be excluded in considering the amount of a reasonable fee);
8 Jennen v. Hunter (In re Hunter), 771 F.2d 1126, 1131 (8th Cir.
9 1985) (ancillary attorney's fee award is subject to apportionment
10 between the dischargeable and nondischargeable parts of the
11 underlying debt); Clear Sky Props., LLC v. Roussel
12 (In re Roussel), 536 B.R. 254, 263 (Bankr. E.D. Ark. 2015)
13 (collecting cases holding that the bankruptcy court must apportion
14 an attorney's fee award into dischargeable and nondischargeable
15 components as dictated by the underlying debt).

16 Upon remand, we instruct the bankruptcy court to reopen the
17 record to determine what amount of Buckley's state court
18 attorney's fees are attributable to Mr. Bartenwerfer's fraud, if
19 any. Because we are remanding the issue of Buckley's state court
20 attorney's fees, we do not address the Bartenwerfers' arguments
21 respecting the court's determinations about the reasonableness of
22 the fees or whether Buckley met his burden of proof. The
23 Bartenwerfers will get another chance to address those issues on
24 remand.

25 **F. The bankruptcy court did not abuse its discretion by awarding**
26 **Buckley interest on the nondischargeable portion of the State**
27 **Court Judgment and on his state court attorney's fees, and it**
28 **did not err by awarding interest at the California judgment**
rate of 10%.

The Bartenwerfers raise a number of arguments with respect to

1 the interest awarded to Buckley.

2 First, they contend Buckley waived his claim for interest by
3 failing to raise it at trial. Buckley requested "interest accrued
4 at the legal rate" on the nondischargeable portion of the State
5 Court Judgment in his dischargeability complaint. Although he did
6 not raise the issue at trial, Buckley raised it in his Fee Motion.
7 In their opposition to the Fee Motion, the Bartenwerfers contended
8 that Buckley waived his right to his state court attorney's fees
9 for failing to raise them at trial; they did not argue that he had
10 waived his right to interest on the nondischargeable portion of
11 the State Court Judgment for failing to do the same. The matter
12 of interest on the nondischargeable portion of the State Court
13 Judgment was discussed at the June 16 hearing on Buckley's Fee
14 Motion. Counsel for the Bartenwerfers made no mention of Buckley
15 waiving his right to interest.

16 The bankruptcy court then reopened the record and ordered
17 further briefing on whether Buckley was entitled to interest on
18 the nondischargeable portion of the State Court Judgment. In
19 their supplemental brief, the Bartenwerfers argued that Buckley
20 should not be awarded interest because he failed to plead it in
21 his dischargeability complaint. When the court noted at the
22 subsequent hearing that their contention was wrong, that Buckley
23 had prayed for interest in his complaint, counsel for the
24 Bartenwerfers conceded that they "missed that" and dropped the
25 issue.

26 We fail to see where the Bartenwerfers argued before the
27 bankruptcy court that Buckley waived his right to interest by
28 neglecting to raise it at trial; thus, this argument has been

1 waived. See United States v. Lara, 815 F.3d 605, 613 (9th Cir.
2 2016) (not making argument before trial court fails to preserve
3 argument for appeal and argument is deemed waived). To the extent
4 they argue that Buckley waived his right to interest for failing
5 to plead it in his complaint, they dropped that argument.

6 Next, the Bartenwerfers contend the bankruptcy court erred by
7 awarding interest on the nondischargeable portion of the State
8 Court Judgment at California's legal rate. They argue that the
9 only final judgment entered was upon a single federal cause of
10 action, namely § 523(a)(2)(A), which was tried in the bankruptcy
11 court; therefore, the federal rate applies.

12 Where a debt that is found to be nondischargeable arose under
13 state law, "the award of prejudgment interest on that debt is also
14 governed by state law." Otto v. Niles (In re Niles), 106 F.3d
15 1456, 1463 (9th Cir. 1997); Oney v. Weinberg (In re Weinberg),
16 410 B.R. 19, 37 (9th Cir. BAP 2009). Under California law, the
17 award of prejudgment interest "is a matter of right where there is
18 a vested right to recover 'damages certain' as of a particular
19 day." In re Niles, 106 F.3d at 1463 (citing Cal. Civ. Code
20 § 3287(a)). The statute "looks to the certainty of the damages
21 suffered by the plaintiff, rather than to a defendant's ultimate
22 liability, in determining whether prejudgment interest is
23 mandated." Wisper Corp. N.V. v. Cal. Commerce Bank, 49 Cal. App.
24 4th 948, 958 (1996). Similarly, interest at the state's judgment
25 interest rate continues to accrue postpetition on nondischargeable
26 debts. Shoen v. Shoen (In re Shoen), 176 F.3d 1150, 1166 (9th
27 Cir. 1999) (citing Bruning v. United States, 376 U.S. 358, 360
28 (1964)).

1 While Buckley prevailed in the adversary proceeding on his
2 § 523(a)(2)(A) claim, the underlying debt arose from failure to
3 disclose information in the sale of real estate subject to a
4 contract created under state law. Therefore, the nondischargeable
5 debt arose under state law. In addition, the State Court Judgment
6 liquidated Buckley's damages, including interest, even though the
7 state court had not yet liquidated the amount of attorney's fees.
8 In short, Buckley's damages were certain. Accordingly, the
9 bankruptcy court did not abuse its discretion by awarding
10 prejudgment interest on the nondischargeable portion of the State
11 Court Judgment at the California rate of 10%.

12 The bankruptcy court also did not abuse its discretion in
13 awarding Buckley interest on his state court attorney's fees as a
14 nondischargeable debt, even if it turns out that no such fees
15 should have been or will be awarded. The court ultimately agreed
16 with Buckley that, under California law, once costs are liquidated
17 they are added to the principal amount of the judgment and the
18 entire amount then bears interest at the California statutory
19 rate. Although not cited, we presume the court relied on Lucky,
20 cited in Buckley's reconsideration motion, for its decision.

21 The Lucky court explained that a prevailing party in
22 California can recover certain costs incurred in litigation, which
23 may include attorney fees if authorized by contract or statute.
24 185 Cal. App. 4th at 137. Where costs are established by the
25 judgment, but the amount of the award is ascertained at a later
26 time, the clerk enters the costs on the judgment after the amount
27 is determined; thus, the amount of the cost award is incorporated
28 into the judgment. Id. Interest at 10% per annum accrues on the

1 unpaid principal amount of the judgment, including the cost award,
2 as of the date of judgment entry. Id. at 137-38. Therefore,
3 interest ordinarily begins to accrue on the prejudgment cost
4 portion of the judgment at the same time it begins to accrue on
5 all other monetary portions of the judgment – upon entry of
6 judgment. Id. at 138.

7 Thus, Buckley's attorney's fee award, once ascertained, would
8 be added to the State Court Judgment and interest at the
9 California rate of 10% would accrue thereon as though it were
10 included in the judgment from the day of entry. Accordingly, the
11 bankruptcy court did not err by determining that Buckley would be
12 entitled to interest on his state court attorney's fees.

13 **VI. CONCLUSION**

14 For the foregoing reasons, we AFFIRM, in part, and VACATE and
15 REMAND, in part.